NO. 21462

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNESTO GONZALEZ-ALONSO,
JORGE GUMMERSINDO VALDELOMAR
y DORTA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in one count of a three-count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellants were charged in all counts of a three-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellants Gonzalez-Alonso [1] and Valdelomar y Dorta [2], and Gustavo Sanchez, Angel Luis Ruiz-Rodriguez [3], and an unindicted co-conspirator, and divers other persons unknown to the Grand Jury, agreed, confederated, and conspired together to commit the offenses of knowingly, with intent to defraud the United States, importing, bringing, smuggling, and clandestinely introducing marihuana into the United States from Mexico, without presenting said marihuana for inspection and entering and declaring it, and concealing and facilitating the concealment and transportation of marihuana which had been imported into the United States contrary to law, said agreement and conspiracy being in violation of Title 21, United States Code, Section 176a [C. T. 2-3]. [4]

Count Two alleged that one Manuel Espinoza-Gutierrez, with intent to defraud the United States, knowingly smuggled, and

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1/ Hereinafter referred to as "Gonzalez".

2/ Charged as "Valdemar y Dorta" and hereinafter referred to as "Valdelomar", as he was referred to during the trial.

3/ Hereinafter referred to as "Ruiz".

4/ "C. T." refers to the Clerk's Transcript, which is Vol. I of the Transcript of Record.

clandestinely introduced from Mexico, approximately 80 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought said marihuana into the United States contrary to law, in that it was not presented for inspection, entered, and declared. It also was alleged that defendants Sanchez and Ruiz and appellants Gonzalez and Valdelomar knowingly aided, abetted, counseled, induced, and procured the commission of the offense [C. T. 4].

Count Three alleged that defendants Valdelomar and Ruiz, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately two pounts of marihuana (in Los Angeles County), which marihuana, as they then and there well knew, had been imported and brought into the United States contrary to law, and that defendant Sanchez and appellant Gonzalez knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C. T. 5].

Jury trial of appellants and co-defendants Sanchez and Ruiz commenced on August 10, 1965, before United States District Judge Fred Kunzel [R. T. 3-6]. 5/ The Government announced it did not intend to proceed upon Count Two, and that count was dismissed before the jury was sworn [R. T. 6].

Appellants' motion to suppress evidence was heard and denied during the trial [R. T. 4, 63-64]. At the conclusion of the Government's case, a motion for judgment of acquittal was granted

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5/ "R. T." refers to the Reporter's Transcript.

as to all defendants upon Count Three and as to defendant Sanchez on Count One [R. T. 223-224, 227-230]. At the suggestion of Government counsel, a motion for judgment of acquittal was later granted as to defendant Ruiz [R. T. 328-329].

Appellants were found guilty as charged in Count One on August 12, 1965 [C. T. 8-9].

Thereafter, on October 1, 1965, appellant Gonzalez was sentenced to ten years in prison and appellant Valdelomar was sentenced to seven years in prison [C. T. 10-11].

Appellants filed timely notices of appeal [C. T. 12-13, 16-17].

III

ERROR SPECIFIED

Appellants specify the following points upon appeal:

1. Alleged error in receiving evidence that was allegedly illegally seized.

2. Insufficient evidence of existence of a conspiracy.

3. Insufficient evidence of appellants' participation in a conspiracy.

(Appellants' Opening Brief, pp. 2-3).

IV

STATEMENT OF THE FACTS

A. The Motion to Suppress Evidence.

On March 23, 1965, United States Customs Port Investigator Leland L. Riggs [6/] was informed by the Customs Agent-in-Charge, John Brockman, that a reliable informant had told Customs Agent Spohr that a certain 1956 Mercury automobile was loaded with a quantity of marihuana in Tijuana and would cross the international border and enter the United States at San Ysidro, probably on the following morning [R. T. 25-27, 32]. The informant had provided the license number and color of the vehicle [R. T. 41].

At approximately 8 a. m. on March 24, 1965, the 1956 Mercury crossed the international border from Tijuana at San Ysidro and entered the United States. Officer Riggs was advised of this entry [R. T. 25-26, 28, 56-57].

The vehicle was the type and of the year described by the informant, had the color mentioned by the informant, and had the license number and state designation described by the informant [R. T. 41].

Although the officers had made arrangements for search of the vehicle by Customs inspectors as it crossed the border, it was not searched when it crossed. Officers Riggs and Arthur Hanson immediately got into a vehicle and followed the Mercury

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6/ Riggs was a Customs Agent at the time of the trial [R. T. 25].

in a northerly direction on the highway. The Mercury had two occupants, including the driver, Antonio Herrera [R. T. 27-29, 42-43, 58].

The vehicles traveled at speeds which varied from approximately 55 to 60 miles per hour. Since the traffic was heavy and the freeway shoulders were quite narrow, Officer Riggs, a former member of the California Highway Patrol, made no attempt to stop the Mercury [R. T. 53-54, 58]. The Mercury left the 28th Street off-ramp on Highway 101 Freeway in San Diego and stopped about 200 yards away from the off-ramp at a point approximately 11 miles from the international border. The officers had taken no action to cause it to half [R. T. 20, 29-30, 43-44].

The officers approached the Mercury and identified themselves. Officer Riggs opened a rear door of the Mercury and noticed that it was extremely heavy. He used a screwdriver to remove a screw and found part of the alleged contraband inside the rear door. He had no search warrant and no warrant of arrest [R. T. 30, 33].

The marihuana was discovered at approximately 8:20 or 8:25 a. m. Additional search of the Mercury occurred at the Customs office in San Diego [R. T. 34, 43].

Appellants also questioned the validity of the arrest of appellant Gonzalez in Los Angeles. No contraband was obtained as a result of that arrest [R. T. 9-11].

The trial Court held that the legality of the arrest of Gonzalez was immaterial and that the search of the Mercury was

a border search. The motion to suppress evidence was denied [R.T. 62, 64].

B. The Trial.

Antonio Herrera had a conversation with a man named Shorty on March 23, 1965. Shorty asked Herrera to take a car to Los Angeles, picking up the car at a Tijuana location if he was willing to do it [R.T. 66-67, 69-71, 87].

On the following day, Herrera talked to Shorty in Tijuana and told him that he would take the car. Shorty told him that he would be paid $50 for driving the vehicle. Shorty told Herrera to park the car at a specific location in Los Angeles and leave it there for a while [R.T. 71, 82-83].

Herrera obtained the vehicle, picked up another man in order to give him a ride to San Diego, and drove the vehicle into the United States from Mexico at about 8 a.m. on March 24 [R.T. 67-69, 72].

The entry was made in San Diego County. Herrera knew that the vehicle contained marihuana. He declared no merchandise [R.T. 69, 92].

Customs officers followed the vehicle, which was a 1956 Mercury, as it proceeded in a northerly direction on Highway 101 from the port of entry at San Ysidro. Herrera stopped the Mercury in San Diego in order to let the passenger get out at approximately 8:20 a.m. Customs Officer Leland L. Riggs searched the Mercury within the following several minutes [R.T. 72, 88, 154-156]. He

found two packages in a door panel [R. T. 157-158, 173].

Customs Port Investigator Arthur E. Hanson searched the vehicle at a Customs garage and found 38 packages in the door panels [R. T. 170-174]. It was stipulated that a chemist would testify that samples taken from each of the packages consisted of marihuana and that the total weight was approximately 75 pounds. The marihuana had an approximate selling price of $10 to $12 per pound in Tijuana, Mexico [R. T. 102-104, 211, 213].

The Mercury had been continuously in Investigator Hanson's view from San Ysidro to the location at which it stopped. Hanson had observed the vehicle as it crossed the border at San Ysidro and had followed it with Officer Riggs [R. T. 170-171, 175-176].

Herrera was arrested after the first two packages were found and after one of them was opened. The two packages found by Riggs were returned to the door panel of the Mercury [R. T. 174, 176].

Herrera [7/] told Riggs that Shorty had asked him to bring the car across the line and that he was to turn off the freeway on Seventh Street in Los Angeles and park by the large orange sign [R. T. 162-163]. On the same morning Herrera headed for Los Angeles with a Customs officer in the same Mercury. They stopped at a gasoline station, where Herrera saw Shorty go by in a station wagon. Herrera mentioned this to the officer, who said that Herrera should continue the trip by himself in the Mercury.

7/ The transcript refers to Herrera as "Vicuna" in several instances. His full name was Antonio Herrera Vicuna [R. T. 260].

Herrera continued on the journey and was passed by the same station wagon. A man in the station wagon showed Herrera a sign in the side window. The sign was made of cardboard and contained the Spanish words:

"Third and Columbia

Wait." [R. T. 72-74].

Herrera delivered the vehicle to Third and Columbia in Los Angeles. It was the same vehicle in which he had crossed the border that morning. Appellant Gonzalez went around the block a couple of times and then told Herrera to get out of the car. Herrera followed appellant Gonzalez into a store, where Gonzalez asked, "Are you sure you haven't been followed?" [R. T. 75, 77, 94-95].

Herrera replied, "No, not that I know of."

Gonzalez said, "Well, the federal agents are two, two or three blocks behind."

Herrera replied, "I don't know anything about it." Then they discussed a flat tire in the Mercury [R. T. 77-78]. A concealed radio device had been attached to Herrera [R. T. 95-96, 132].

Appellant Gonzalez told Herrera to fix the flat tire and park the Mercury around the corner in back of a Studebaker. He also gave five dollars to Herrera and told him, "You go and stay in a movie or something, and two or three hours later, you come and pick the car up at the same place." [R. T. 77-78, 81-82].

Herrera had the tire fixed at a gasoline station, drove around the block, and saw a Studebaker there. He did not have a chance to park the car, because a man waved to him to stop and

got into the Mercury and drove away. This man was either appellant Valdelomar or co-defendant Sanchez [R. T. 78-81]. He entered the Mercury a few seconds after it was stopped by Herrera [R. T. 259-262].

At 1:50 p. m. on March 24, appellant Valdelomar and co-defendant Ruiz were arrested in the same Mercury automobile in which Herrera had crossed the border at San Ysidro [R. T. 155, 171, 187-188]. The Mercury was moving, and appellant Valdelomar was driving at a point about two blocks from Columbia and about two blocks south of Third Street in Los Angeles [R. T. 188, 195]. The two packages previously found by Riggs were again found in a door panel of the Mercury [R. T. 157, 189-190, 210].

Appellant Gonzalez and co-defendant Sanchez were arrested in a Ford automobile at approximately 2 p. m. on March 24. Sanchez was driving [R. T. 215-216].

Defendant Ruiz testified that he entered the automobile (shortly before the arrest) after appellant Valdelomar told him that he was going to eat and invited Ruiz to go along. Appellants Gonzalez and Valdelomar did not testify [R. T. 231, 239-240, 258].

V

ARGUMENT

A. APPELLANTS HAVE NO STANDING TO OBJECT TO THE ADMISSIBILITY OF THE CONTRABAND.

Appellants Gonzalez and Valdelomar contend that the search of the Mercury in San Diego was unreasonable. Neither appellant was in the Mercury when the search occurred in San Diego and neither appellant at any time claimed any interest in the Mercury nor in the contraband that was seized. The jury was not instructed in regard to the statutory presumption under Title 21, United States Code, Section 176a [R. T. 343-365]. Under these circumstances, appellants had no standing to object to the introduction of the evidence obtained in the search of the vehicle that had been driven by Herrera.

Diaz-Rosendo v. United States,

357 F. 2d 124 (9th Cir. 1966).

Here, as in Diaz-Rosendo (at p. 132), the appellants were not on the premises "where the search occurred" and the judgments of conviction "did not flow from the possession" by appellants at the time of the search.

Appellant Valdelomar contends that he has standing because the second alleged overt act charged that he entered an automobile which contained part of the marihuana. The second overt act allegation did not mention the contraband or marihuana [C. T. 3]. Furthermore, Valdelomar's entry in Los Angeles occurred after

the search and after the seizure of the contraband marihuana in San Diego.

In addition, appellant Valdelomar's overt act argument lacks substance because it is not necessary to prove the commission of overt acts in Title 21 narcotics and marihuana conspiracy cases.

Leyvas v. United States,

9th Cir. No. 20,790, January 6, 1967;

United States v. Gardner,

202 F. Supp. 256 (N.D. Cal. 1962).

The overt act allegations in the indictment consisted of immaterial surplusage.

B. ASSUMING ARGUENDO THAT APPELLANTS HAVE STANDING TO OBJECT, THE SEARCH OF THE MERCURY WAS A REASONABLE BORDER SEARCH.

Assuming, for purposes of argument only, that appellants have standing to object to the search of the Mercury in San Diego, it is respectfully submitted that the trial Court was entirely correct in its determination that the search of the Mercury in San Diego was a proper border search.

Neither probable cause nor an arrest is necessary in order to justify a border search.

King v. United States, 348 F. 2d 814, 817 (9th Cir. 1965), cert. den. 382 U.S. 926 (1965);

Alexander v. United States,

362 F.2d 379, 381-382 (9th Cir. 1966).

In Alexander, this Court held (at p. 382) that the legality of a border search that is not made in the immediate vicinity of the border "must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search'."

In the instant case, the initial search occurred approximately 11 miles from the border about 20 or 25 minutes after the Mercury entered the United States [R.T. 43-44, 57]. Investigator Hanson had observed the Mercury as it crossed the international border at San Ysidro, and it was continuously in his view from San Ysidro to the location at which it was stopped [R.T. 170-171, 175-176]. 8/

Consequently, it is clear that the fact finder was reasonably certain that the contraband found in the Mercury at the time of search "was aboard the vehicle at the time of entry into the

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8/ This evidence was heard during the jury trial rather than during the hearing of the motion to suppress evidence. However, such evidence may be considered upon appeal.

Carroll v. United States, 267 U.S. 132, 162 (1925).

jurisdiction of the United States", which is the test set forth in Alexander, supra.

Appellants assert that the officers waived the right to a border search by letting the vehicle pass the border in the hopes of catching more important conspirators. The evidence demonstrates that the agents planned a search at the port of entry but that the inspectors passed the vehicle through [R. T. 42-43]. However, regardless of the circumstances here, there is no rule providing for "waiver" of the right to make a border search by permitting a vehicle to cross the border or pass the port of entry. On the contrary, the courts have repeatedly upheld border searches which occurred after the initial inspection point or port of entry was passed without search.

King, supra, at pp. 815-818;

Alexander, supra;

Murgia v. United States, 285 F. 2d 14, 16-17 (9th Cir. 1960).

In King, supra, the officer deliberately permitted the suspect vehicle to pass the port of entry (footnote, p. 815). This Court upheld the subsequent search as a border search.

C. ASSUMING ARGUENDO THAT THE SEARCH WAS NOT A BORDER SEARCH, THE OFFICERS HAD PROBABLE CAUSE TO ARREST AND SEARCH.

Assuming arguendo that appellants have standing to object and that the search of the Mercury was not a border search, it is respectfully submitted that Officer Riggs had probable cause to search the Mercury and probable cause to arrest Herrera before the search commenced.

An arrest may be based solely upon information provided by a single reliable informant.

Costello v. United States, 324 F. 2d 260, 262 (9th Cir. 1963), cert. den. 376 U.S. 930 (1964);

Jones v. United States, 326 F. 2d 124, 128-129 (9th Cir. 1963), cert. den. 377 U.S. 956 (1964);

United States v. Salgado, 347 F. 2d 216, 217 (2nd Cir. 1965), cert. den. 382 U.S. 870 (1965);

United States v. Campos, 255 F. Supp. 853, 857 (S.D. N.Y. 1966);

People v. Guerrera, 149 Cal. App. 2d 133, 136 (1957);

People v. Garnett, 148 Cal. App. 2d 280, 284 (1957).

There are two ways in which information given by an informant may be proved to be reliable. Reliability may be shown by past reliability of the informant, or it may be shown by the existence of corroborating facts which add authenticity to the original statements from the informant.

Jones, supra, at pp. 128-129.

In the instant case, reliability of the informant was shown by both methods. Officer Riggs must have reasonably assumed that the informant was reliable in the past, because his officer-in-charge, Agent Brockman, stated that the informant was reliable [R.T. 26-27]. The informant's reliability also was established under the corroborating circumstances doctrine, since the accuracy of the information was plainly evidenced by the subsequent observations of the officers.

The informant had stated that a specific automobile was loaded with a quantity of marihuana and would cross the international border and enter the United States at San Ysidro, probably on the following morning [R.T. 26].

On the following morning, at approximately 8 a.m., the described vehicle crossed the international border from Tijuana at San Ysidro and entered the United States. Officer Riggs was advised of this entry [R.T. 25-26, 28, 56-57]. The informant had correctly stated the type of vehicle, the year model of the vehicle, the color, the license number, and the state designation upon the license plate [R.T. 41].

In this respect, the case was very similar to Jones, supra, in which this Court held that there was probable cause to arrest after an informant stated that a certain automobile would enter the United States on a certain day or night with narcotics, and the appearance of the vehicle and occupants as predicted "added to the previous reliability of the informant, and gave the government

officers reason to stop appellant." (at p. 129).

Once probable cause to arrest is shown, it is immaterial that the search precedes the arrest.

Busby v. United States, 296 F. 2d 328, 332 (9th Cir. 1961), cert. den. 369 U.S. 876 (1962).

Furthermore, the officers did not need probable cause to arrest Herrera in order to search, so long as they had probable cause to believe that the vehicle contained smuggled merchandise.

Browning v. United States, 366 F. 2d 420, 422 (9th Cir. 1966);

Leong Chong Wing v. United States, 95 F. 2d 903, 904 (9th Cir. 1938).

Validity of an arrest is immaterial where the search is based upon reasonable grounds to believe that contraband is present.

Carroll v. United States, 267 U.S. 132, 158 (1925).

Reasonable grounds existed in the instant case.

D. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF EACH APPELLANT.

Appellants argue that there was insufficient evidence of the existence of a conspiracy and insufficient evidence to show that they participated in a conspiracy.

The existence of a conspiracy was clearly shown by Herrera's testimony concerning his agreement with Shorty and his knowledge that the vehicle contained marihuana [R. T. 66-67, 69-71,

82-83, 87, 92].

Since evidence upon appeal must be viewed in the light most favorable to the prevailing party in the trial court, 9/ Herrera's testimony was sufficient to show the existence of a conspiracy.

Once the existence of a conspiracy is shown, slight evidence is all that is required to connect a defendant with the conspiracy.

Diaz-Rosendo, supra, at p. 130;

Sabari v. United States, 333 F. 2d 1019 (9th Cir. 1964).

The question, then, is whether slight evidence was introduced against appellants.

Preliminarily, it should be noted that a common marihuana smuggling scheme was employed here. This Court has had occasion to hear a number of cases in which the consignees of large loads of marihuana have arranged for delivery of vehicles upon streets in the Los Angeles area.

Diaz-Rosendo, supra, 357 F. 2d 124;

Diaz-Rosendo v. United States, 364 F. 2d 941 (9th Cir. 1966);

Cook v. United States, 354 F. 2d 529 (9th Cir. 1965).

While it should be the policy of the law to obtain a conviction of "the real rascal" in marihuana-smuggling cases, 10/ it is not to be expected that the clever individuals who pick up these loads of

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9/ Diaz-Rosendo, supra, at p. 129.

10/ Aguilar v. United States, 363 F. 2d 379, 381 (9th Cir. 1966).

marihuana from the street will confess or make other serious admissions, allow themselves to be caught with incriminating evidence in their pockets, or employ an automobile whose registration can be traced back to themselves. The primary evidence against such an individual is the fact that he picks up and drives away an automobile which was intended to be loaded with marihuana. This is the primary evidence against appellant Valdelomar, although there are additional factors of importance.

The case against appellant Gonzalez does not require extended discussion. Herrera had been instructed to take the Mercury to Third and Columbia and wait. The Mercury was supposed to have contained about 75 pounds of marihuana [R. T. 72-74, 102-104, 211]. Herrera delivered the vehicle to Third and Columbia. Appellant Gonzalez circled the block a couple of times [R. T. 75, 77, 94-95]. This would be a natural procedure for a marihuana conspirator, who would be expected to study the neighborhood in an effort to ascertain whether law enforcement officers were engaged in surveillance of the Mercury.

Gonzalez finally stopped and told Herrera to leave the vehicle. They entered a store, where Gonzalez asked, "Are you sure you haven't been followed?" [R. T. 77, 94-95]. The choice of the store undoubtedly was for the purpose of engaging in a secure conversation outside of the view of any officers who might be watching the Mercury or Herrera.

Gonzalez told Herrera that the federal agents were two or three blocks behind [R. T. 77], probably making a false statement

in order to test Herrera's reaction. It is significant that Gonzalez mentioned federal agents, as smuggling marihuana is a federal crime, whereas mere possession or transportation of marihuana is more frequently the subject of local law enforcement.

Gonzalez told Herrera to take the Mercury around the corner and park behind a Studebaker. He gave Herrera five dollars and told him, "You go and stay in a movie or something, and two or three hours later, you come and pick the car up at the same place." [R. T. 78, 82]. 11/ The guilt of appellant Gonzalez is clear from the evidence.

Appellant Valdelomar apparently was too anxious to wait for Herrera to park the Mercury, for he waved to Herrera to stop after Herrera spotted the Studebaker. (Herrera testified that the man who waved to him and drove away in the Mercury was either Valdelomar or Sanchez. Ruiz testified that Valdelomar drove. Valdelomar was driving when the officer stopped the Mercury [R. T. 78-80, 187-188, 238-239].)

Valdelomar had told Ruiz that he was going to eat and had invited Ruiz to go along. Valdelomar entered the Mercury a few seconds after Herrera stopped [R. T. 239, 259-262]. When the officer stopped the Mercury operated by Valdelomar, it still contained two of the marihuana packages previously found by Riggs in the same Mercury [R. T. 157, 188-190, 210].

The evidence of Valdelomar's guilt also is clear from the

11/ Which is fully consistent with Shorty's instructions to Herrera [R. T. 71, 82-83].

record. This conclusion is fortified by his counsel's attempted explanation of Valdelomar's conduct. While Valdelomar did not testify, his counsel argued to the jury as follows:

> "He might have stolen the car to begin with. This would make him a thief, but it certainly wouldn't substantiate the case. He may have made a mistake. He might have gotten the wrong car. He might have been repairing the car. He might have been doing many things, if we are going to guess." [R. T. 311].

The suggestion that Valdelomar had previously stolen the Mercury is incredible. Why would he boldly signal a complete stranger, Herrera, and drive away in the Mercury in broad daylight seconds after Herrera stopped the vehicle? (The arrest of Valdelomar occurred at 1:50 p. m. [R. T. 188-198].) One would expect that a thief in full possession of his faculties would wonder why Herrera was driving the Mercury and would wonder where it had been recently.

The suggestion that Valdelomar mistakenly picked up the Mercury is also completely unreasonable, in view of the fact that he waved Herrera to a stop. The repair theory also is unsound, because Valdelomar told Ruiz that he was going to go to eat [R. T. 239]. This testimony by Ruiz also would discredit other imaginary or fanciful theories which might come to mind in the absence of any explanation by Valdelomar.

In the instant case, as in Eason v. United States, 281 F. 2d 818, 821 (9th Cir. 1960), the jury would be fully justified in finding

a joint criminal venture involving Gonzales and Valdelomar.

Appellants contend that in circumstantial evidence cases, the inference reasonably to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence, citing Fifth Circuit cases (Appellants' Opening Brief, p. 14). This rule has been rejected by the Supreme Court and by this Circuit.

> Byrnes v. United States, 327 F. 2d 825, note 5a, pp. 829-830 (9th Cir. 1964).
>
> "The current test is whether 'reasonable minds could find that the evidence excludes every hypothesis but that of guilt'."
>
> Byrnes, supra, note 5a, p. 830.

The evidence certainly excluded the hypotheses suggested in the jury argument by counsel for Valdelomar (i.e., stolen car, mistake, etc.).

Appellants state that the evidence "is completely devoid of proof regarding (1) who conspired, (2) when they conspired, or (3) where they conspired." (Appellants' Opening Brief, p. 14). The conspirators included Herrera, Shorty, Gonzalez, and Valdelomar. The time of portions of the conspiracy was well-established by evidence of conversations between Shorty and Herrera, and the subsequent criminal journey. The location (from Tijuana, Mexico, to Los Angeles, California) also was well-established. In these respects, the evidence was analogous to the circumstantial evidence in Cook, supra, and the first Diaz-Rosendo

case, supra, 357 F. 2d 124.

Appellants suggest that it is paradoxical that they were acquitted of aiding and abetting the smuggling of marihuana. Count Two, which alleged the aiding and abetting of marihuana-smuggling, was the subject of a Government election not to proceed, before the jury was sworn [R. T. 6]. The reasons for this decision became obvious when the evidence contained no mention of Manuel Espinoza-Gutierrez. Appellants could not aid and abet Espinoza-Gutierrez as alleged in Count Two if the latter had not committed a crime.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON,
Assistant U. S. Attorney.